A **DATUK HJ MOHAMMAD TUFAIL MAHMUD & ORS**

v.

DATO' TING CHECK SII

B FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ALAUDDIN MOHD SHERIFF PCA
ARIFIN ZAKARIA CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
C ZULKEFLI MAKINUDIN FCJ
[CIVIL APPEAL NOS: 02(i)-3-2009 (Q) & 02(i)-4-2009 (Q)]
10 JUNE 2009

D ***LEGAL PROFESSION:*** *Practice of law - Advocates and solicitors - Right of audience - Appeals before Court of Appeal sitting at Putrajaya against decision of High Court in Sarawak - Whether advocate and solicitor from Peninsular Malaysia entitled to appear as counsel - Whether advocate from Sarawak entitled to appear as counsel - Malaysia Act 1963, ss. 13(2), 63, 73(3), 87(1), (7) and (9)*

E Both the appeals here originated from the High Court of Sabah and Sarawak at Kuching and were fixed before the Court of Appeal sitting at Putrajaya. One appeal was against the order of the High Court dismissing a petition presented under s. 181 of the
F Companies Act 1965 and the other was against the dismissal of a winding up petition. At the Court of Appeal, the respondent was represented by Tommy Thomas, an advocate of the High Court in Malaya, leading other advocates from Sarawak. The appellant objected to Tommy Thomas representing the respondent. The
G Court of Appeal unanimously held that Tommy Thomas had the right to appear at the Court of Appeal when it sits in Putrajaya. Leave was then granted to the appellant to clarify the above ruling by the Court of Appeal. The two questions posed to the Federal Court were as follows: (i) Whether an advocate and solicitor from
H Peninsular Malaysia is entitled to appear as counsel in an appeal to be heard in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching; and (ii) whether an advocate from Sarawak is entitled to appear as counsel in an appeal to be heard (by the Court of Appeal) in Putrajaya arising
I from a matter originating from the High Court in Sarawak and Sabah at Kuching.

Held

Per Zaki Tun Azmi CJ delivering judgment of the court:

(1) Reading ss. 13(2), 63, 73(3) and 87(1), (7) and (9) of the Malaysia Act 1963 together, upon the coming into force of the Malaysia Act, the Sarawak advocates have a right of audience in the new Federal Court in respect of matters arising in Sarawak and there is no distinction or restriction as to the place of hearing. (para 32)

(2) Since s. 87(9) of the Malaysia Act 1963 is subject to art. 161B of the Federal Constitution, the effect is that the advocates and solicitors of Malaya are restricted from appearing in cases arising in Sabah and Sarawak even when such cases are being heard outside Sabah and Sarawak. (para 33)

(3) The answer to the first question was in the negative and the second question was in the affirmative. (para 47)

Bahasa Malaysia *Translation Of Headnotes*

Kedua-dua rayuan di sini bermula dari Mahkamah Tinggi Sabah dan Sarawak di Kuching dan telah ditetapkan di hadapan Mahkamah Rayuan yang bersidang di Putrajaya. Satu rayuan ialah terhadap perintah Mahkamah Tinggi menolak suatu petisyen yang dikemukakan di bawah s. 181 Akta Syarikat 1965 dan satu lagi ialah terhadap penolakan sesuatu petisyen penggulungan. Di Mahkamah Rayuan, responden telah diwakili oleh Tommy Thomas, seorang peguambela Mahkamah Tinggi di Malaya, mengetuai peguambela-peguambela lain dari Sarawak. Perayu membantah terhadap Tommy Thomas mewakili responden. Mahkamah Rayuan membuat keputusan sebulat suara bahawa Tommy Thomas mempunyai hak untuk hadir di Mahkamah Rayuan apabila ia bersidang di Putrajaya. Kebenaran selepas itu diberi kepada perayu untuk menjelaskan arahan di atas oleh Mahkamah Rayuan. Kedua-dua soalan yang dikemukakan kepada Mahkamah Persekutuan ialah seperti berikut: (i) Sama ada seorang peguambela dan peguamcara dari Semenanjung Malaysia berhak hadir sebagai peguam dalam suatu rayuan yang akan dibicara di Putrajaya berbangkit daripada suatu perkara yang bermula dari Mahkamah Tinggi di Sarawak dan Sabah di Kuching; dan (ii) sama ada seorang peguambela dari Sarawak berhak hadir sebagai peguam dalam suatu rayuan yang

akan dibicara (oleh Mahkamah Rayuan) di Putrajaya berbangkit daripada suatu perkara yang bermula dari Mahkamah Tinggi di Sarawak dan Sabah di Kuching.

Diputuskan

Oleh Zaki Tun Azmi KHN menyampaikan penghakiman mahkamah:

(1) Membaca ss. 13(2), 63, 73(3) dan 87(1), (7) dan (9) Akta Malaysia 1963 bersama-sama, atas penguatkuasaan Akta Malaysia, peguambela-peguambela Sarawak mempunyai hak untuk didengar di Mahkamah Persekutuan baru berhubungan dengan perkara-perkara yang berbangkit di Sarawak dan tidak ada perbezaan atau batasan berkenaan dengan tempat pembicaraan itu diadakan.

(2) Oleh kerana s. 87(9) Akta Malaysia 1963 tertakluk kepada perkara 161B Perlembagaan Persekutuan, efeknya ialah bahawa peguambela dan peguamcara Malaya dihalang dari hadir dalam kes-kes yang berbangkit daripada Sabah dan Sarawak walaupun kes begitu dibicara di luar Sabah dan Sarawak.

(3) Jawapan kepada soalan pertama merupakan negatif dan kepada soalan kedua merupakan afirmatif.

Case(s) referred to:

Dato' Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***

Legislation referred to:

Advocates Ordinance (Sarawak), s. 8
Companies Act 1965, s. 181
Courts of Judicature Act 1964, s. 5
Federal Constitution, arts. 74, 77, 161B
Legal Profession Act 1976, ss. 2, 35
Malaysia Act (No. 26 of 1963), ss. 13(2), 63, 73(3), 74(1), 87(1), (7), (8), (9)

For the applicant/respondent - Sim Hui Chuang (Lim Lip See & Wilian Yeo with him); M/s JM Lim & Co
For the respondent/appellant - George Lo (James Lo & Ting Cheng Ching with him); M/s George Lo & Partners
Amicus Curiea
For Sabah State Government - Juprin Wong-Adamal SSC
For Sarawak State Government - Datuk JC Fong; State Legal Counsel (Supian Tarmizi Hj Tazudim & Saferi Ali SCs with him)

For AG's Chambers - See Mee Chun SFC
For Malaysian Bar - Ranjit Singh Sar
For Advocates Association of Sarawak - Frank Tang (Sarbit Singh & Khairil Azmi with him)
For Sabah Law Association - Alex Decena (Jeyan Marimuttu, Datuk Stephen Foo & Datuk John Sikayun with him)

Reported by Amutha Suppayah

JUDGMENT

Zaki Tun Azmi CJ:

Questions

[1] In light of the urgency of the matter, we gave our decision earlier. Here now are our reasons.

[2] The right to be heard is an integral part of the rules of natural justice. The right to be represented by counsel of one's choice is however conditional upon the laws regulating it. Such conditions are the subject matter of this judgment.

[3] The two questions posed before us were drafted as follows:

(i) Whether an advocate and solicitor from Peninsular Malaysia is entitled to appear as counsel in an appeal to be heard in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching?

(ii) Whether an advocate from Sarawak is entitled to appear as counsel in an appeal to be heard (by the Court of Appeal) in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching?

(Words in parenthesis were added)

[4] The answers to the above questions would determine whether there exist any exclusive rights of the advocates and solicitors of Sabah and Sarawak to appear in Peninsular Malaysia and *vice versa*.

Facts Leading To The Questions

[5] Both appeals that came before us were not regarding the real subject matter of the original suit at the High Court level. These questions arose only as preliminary objections.

[6] At the Court of Appeal, one appeal was directed against the order of the High Court dismissing a petition presented under s. 181 of the Companies Act 1965 and the other was directed against the dismissal of a winding up petition. Both appeals were fixed before the Court of Appeal sitting at Putrajaya.

[7] At the Court of Appeal, the respondent was represented by Mr. Tommy Thomas, an advocate of the High Court in Malaya, leading other advocates from Sarawak. At the outset of the appeal, the appellant objected to Mr. Tommy Thomas representing the respondent.

Court Of Appeal's Decision

[8] The Court of Appeal unanimously held that Mr. Tommy Thomas had the right to appear at the Court of Appeal when it sits in Putrajaya. Gopal Sri Ram JCA, in dismissing the preliminary objection, said:

> [3] It is clear from a collective reading of the foregoing sections that only a person admitted to practice as an advocate at the High Court of Sarawak may appear before that court and the Federal Court when it sits in Sarawak to hear appeals from that State. Be it noted that there is a glaring omission about the right of audience before this court in appeals arising from decisions of the High Court in Sarawak. Be it also noted that the Ordinance has no extra-territorial effect. That is to say, it does not apply to appeals that are posted for hearing within the States of Malaya.
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> [4] Now, as against the Ordinance, there is s. 39 of the Courts of Judicature Act 1964 which is a federal law having effect throughout the Federation. That section says this in reference to the sittings of the Court of Appeal:
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> > 39(1) The Court shall sit on such dates and at such places as the President may from time to time appoint:
> >
> > Provided that the President may, when he deems it expedient, direct that any appeal be heard at any time and in any place in Malaysia.
> >
> > (2) The President may cancel or postpone any sitting of the Court which has been appointed under subsection (1).

[5] We consider the first subsection and its proviso to be relevant to the case at hand. As may be seen, it empowers the President of this court to direct it to convene anywhere within Malaysia and to direct any appeal to be heard anywhere therein. It follows that the President may direct an appeal against the decision of the High Court in Sabah and Sarawak to be heard by this court anywhere in the States of Malaya. This is what has happened in the present instance. In such a case, the right of audience before this court is governed, not by the Ordinance, but by the Legal Profession Act 1976. And it is beyond dispute that Mr Thomas has the right of audience before this court when it sits in Putrajaya.

[6] It follows from what we have said thus far that the objection taken cannot succeed. We would accordingly dismiss it.[1]

[9] Leave was then sought by the appellant, and granted, to clarify the above ruling by the Court of Appeal. As these issues would affect all advocate and solicitors in Malaysia, we invited the Attorney General's Chambers, State Attorney-General's Chambers Sabah, State Legal Counsel Sarawak, the Malaysian Bar Council, Advocates Association Of Sarawak and Sabah Law Association to submit as *amicus curiae*.

[10] There was really no dispute over the interpretation of the legal provisions; in fact, the submission of the appellant was substantially supported by all of the amicus curiae, as well as the submission by the respondent. As such, the submission of Mr. Sim Hui Chuang, leading counsel for the appellant was selected as a basis for this judgment.

[11] For the purpose of this judgment, "Sabah" and "North Borneo" are both interchangeably used and referred as having the same geographical entities.

Historical Background

[12] To understand the position of the Advocate's Ordinance, it would be useful to know the set up of the Courts in Sabah and Sarawak before the formation of Malaysia. There were then three tiers of courts in Sabah and Sarawak, namely:

i. The Supreme Court of Sarawak, North Borneo and Brunei (which consisted of a High Court of Sarawak, North Borneo and Brunei and a Court of Appeal of Sarawak, North Borneo and Brunei);

A ii. The magistrates court; and

iii. The Native Courts.

This court structure was retained even after Malaysia Day except with the change of name from the "Court of Appeal" to "Federal Court". Today, these terms have different connotations. The "Federal Court" being the appellate court of last resort and the "Court of Appeal" being intermediate appellate court.

[13] Rule 3 of the Sarawak, North Borneo and Brunei Court of Appeal Rules[2] provides that the place where the Court of Appeal shall ordinarily sit depend on where the appeal or matter arises. At the same time, advocates admitted to practice under Advocates Ordinance have exclusive right to practice in Sarawak and to appear and plead in the Supreme Court and in all courts in Sarawak subordinate from the Supreme Court. They are not limited to the place of sitting of the court.

[14] Safeguards and assurances provided to Sarawak (in this case; lawyers) were critical and pivotal to secure the participation of Sarawak in the formation of Malaysia.

[15] The Cobbold Commission was created to ascertain the views of the people of the Borneo States. The report showed that the people had fears of substitution of one colonization with another; fear of being taken over by the then Federation of Malaya; fears of the submersion of the individualities of North Borneo and Sarawak within the then Federation of Malaya.

[16] The Cobbold Commission unanimously agreed that the formation of the Federation of Malaysia is in the best interest of North Borneo and Sarawak.[3]

[17] These fears were ultimately addressed by the formation of the Inter-Governmental Committee (IGC) on which the British, Malaya (now properly known as Semenanjung Malaysia), North Borneo and Sarawak Governments were represented. Its task was to work out the future constitutional arrangements, including safeguards for the special interests of North Borneo and Sarawak relying on the Cobbold Commission Report. The relevant paragraphs being paras. 3,[4] 6[5] and 7[6] of the IGC report 1962.

[18] Following the IGC Report, the Malaysia Agreement was concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore and signed on 9 July 1963.[7] By the Malaysia Agreement, Malaysia came into being on 16 September 1963.

[19] Article VIII of the Malaysia Agreement[8] provides that the Government of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in, *inter alia*, Annexes A and B to the IGC Report, in so far as they are not implemented by express provision of the Constitution of Malaysia.

[20] It was submitted that the right to practice law, can be seen in one of the safeguards contained in Annexure A to the Inter-Governmental Commission report. Para 4 of Annexure A is about Civil and Criminal Law and procedure and the administration of Justice. Paragraph 4(d) ("the 4(d) Safeguard"), which is the relevant part, reads as follows:

> **4(d): Persons entitled to practise before such Courts;**
>
> Restrictions on the lines of the existing Borneo legislation should be continued, so that practice at the local Bar would, subject to certain exceptions provided for in that legislation, be restricted to resident advocates, until otherwise agreed by the Borneo State Legislatures.

[21] By the 4(d) Safeguard, it was agreed that after formation of Malaysia, the exclusive rights of the Sarawak Bar to practise in respect of all Sarawak matters (ie, all matters in or arising in Sarawak) as stated in s. 8 of Advocates Ordinance before Malaysia day[9] would continue.

[22] Even before the formation of Malaysia, the Sarawak Bar, under the Advocates Ordinance of Sarawak, had the exclusive right to:

i. practice in Sarawak;

ii. appear and plead in the Supreme Court; and

iii. appear and plead in all subordinate Courts in Sarawak

[23] It must be noted that without such recommendations in the IGC, Cobbold Commission and the Malaysia Agreement, there may not be a Malaysia.[10] These recommendations were not intended to and did not take away any of the Sarawak Bar's exclusive right. In fact, the rights were entrenched as a safeguard and were further extended so as to cover the right of audience before the new Federal Court.

[24] The creation of a new Federal Court was recommended in the Cobbold Commission Report and was embodied in para. 26(1)[11] and (4)[12] of the IGC Report.

[25] Now we look into the Federal Constitution ("the Constitution"). Article 74[13] and 77[14] of the Constitution are the relevant articles in this case and both articles lay down the relationship between the Federation and the States. Item 4 of List I of the Ninth Schedule to the Constitution, read with arts. 74 and 77 of the Constitution, deals with the matter of administration of justice, jurisdiction of courts and the right to practice before the courts. Item 4 reads:

> 4. Civil and criminal law and procedure and the administration of justice, including:
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> (a) Constitution and organization of all courts other than Syariah Courts;
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> (b) Jurisdiction and powers of all such courts;
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> (c) Remuneration and other privileges of the judges and officers presiding over such courts;
>
> (d) Persons entitled to practice before such courts;

[26] It was submitted that the Federal Court, which was established upon formation of Malaysia, is to be included in the interpretation of "all courts other than Syariah Courts". Having that interpretation on one hand, and the 4(d) Safeguard on the other hand, the Sarawak Bar would seem to continue to have the exclusiveness as encapsulated in s. 8 of the Advocates Ordinance of Sarawak, which was enacted in 1953 and also when Malaysia was formed. Such interpretation will be consistent with para. 26(3) of the IGC Report which provides for a new Federal Court as the appellate court for the three different jurisdictions. This is supported by para. 26(4) of the same report which distinguishes "a case arising from a Borneo State" from others and hearing it outside Sarawak.

[27] Though it may not be the norm, that a Sarawak matter be heard outside Sarawak, it could not have been intended, by the Legislature that when an appeal case arising in Sarawak is heard outside Sarawak, a member of the Sarawak Bar would suddenly lose that right of audience.

The Law

[28] The Malaysia Act (No. 26 of 1963) is an Act of Parliament. The relevant sections of the Malaysia Act, namely ss. 13(2),[15] 63,[16] 73(3),[17] and 87(1),[18] (7),[19] (8)[20] and (9)[21] were incorporated to form as part of the Constitution.

[29] By these provisions, the then Federal Court was empowered with the exclusive jurisdiction to determine appeals from the High Court.[22]

[30] Article 161B[23] of the Constitution, which was mentioned in s. 87(9) of the Malaysia Act, is self explanatory. It forms the safeguard for the Sabah and Sarawak Bars which restricts the right to practise only to its resident advocates as agreed to by the respective State Legislations.

[31] Regarding the interpretation of art. 161B of the Constitution, we refer to *Dato' Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus*[24] where Raja Azlan Shah (AG LP) had this to say:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – "with less rigidity and more generosity than other Acts" (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin

A of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136.

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It is in the light of this kind of ambulatory approach that we must construe our Constitution. The Federal Constitution was enacted as a result of negotiations and discussions between the British Government, the Malay Rulers and the Alliance Party relating to the terms on which independence should be granted. One of its main features is the enumeration and entrenchment of certain rights and freedoms. Embodied in these rights are the guarantee provisions of Article 71 and the first point to note is that that right does not claim to be new. It already exists long before Merdeka, and the purpose of the entrenchment is to protect it against encroachment. In other words the provisions of Article 71 are a graphic illustration of the depth of our heritage and the strength of our constitutional law to guarantee and protect matters of succession of a Ruler (including election of the Undangs) which already exist against encroachment, abrogation or infringement.

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[32] Thus, reading s. 13(2), ss. 63, 73(3) and 87(1), (7) and (9) of the Malaysia Act together, upon the coming into force of the Malaysia Act, the Sarawak advocates have a right of audience in the new Federal Court in respect of matters arising in Sarawak and there was no distinction or restriction as to the place of hearing.

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[33] Since s. 87(9) is subject to art. 161B of the Constitution, the effect is that the advocates and solicitors of Malaya is restricted from appearing in cases arising in Sabah and Sarawak even when such cases are being heard outside Sabah and Sarawak.

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Amendments To Section 8 Of The Advocate Ordinance

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[34] The 4(d) Safeguard[25] were well protected in the Advocates Ordinance of Sarawak (and Sabah) until it was amended in 1965.

[35] On 16 March 1964, the Courts of Judicature Act 1964 ("CJA") came into force in Malaysia, six months after Malaysia Day on 16 September 1963. Section 5[26] of the CJA requires the substitution for the expression "Supreme Court" with the

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expressions "Federal Court" or "High Court" as the context may require. Section 5 of the CJA is expressly made retrospective to take effect on Malaysia Day, 16 September 1963. (Section 5 was later deleted on 1 January 1985.)

[36] The authority to extend s. 5 of the CJA to the Advocates Ordinance of Sarawak can be derived from s. 74(1)[27] of the Malaysia Act. Section 74(1) of the Malaysia Act empowers the Yang di-Pertuan Agong to make modifications of the law if it appears necessary or expedient in any present law relating to matters about which Parliament has power to make laws.

[37] Upon the powers granted by s. 74(1) to the Yang di-Pertuan Agong, the term "Supreme Court" in the Advocates Ordinance of Sarawak (and Sabah) was supposed to be substituted with the term "Federal Court" or the expression "High Court" as required by s. 5 of the CJA.

[38] Unfortunately, this was not how it was done.

[39] The amendments followed through *via* the Modification of Laws (Advocates) (Borneo States) Order 1965, L.N. 435 of 1965, ("the Order"). The Order states that the Advocates Ordinance of Sarawak shall have effect in Sarawak with the modifications set out in the Second Schedule to the Order. One of the sections that was amended was s. 8 and the relevant provison of the Order is set out below:

(a) Substitute for "8. Subject to the provisions of" "8 (1). Subject to sub-section (2) and to"

(b) Substitute for "Supreme Court" (as those words are amended by section 5 of the Courts of Judicature Act, 1964) "Federal Court in Sarawak and in the High Court".

(c) ...

(d) ...

[40] The amended s. 8 of the Advocates Ordinance of Sarawak now reads:

Section 8: Right to practice in Sarawak

1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practice in Sarawak and to appear and **plead in the Federal Court in Sarawak and the High**

A **Court**, and in all courts in Sarawak subordinate thereto in which advocates may appear, and, as between themselves, shall have the same rights and privileges without differentiation:

(emphasis added)

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[41] Note that instead of just substituting the expression "Federal Court", the Order changed it to "Federal Court in Sarawak". This was when the problem started. The Sarawak lawyers are being restricted to appear within the borders of Sarawak for Federal C Court appeals.

[42] Reading the Cobbold Commission Report, the IGC, Malaysia Act, Advocates Ordinance of Sarawak and all culminating into art. 161B of the Constitution the plain and obvious intention is D that legal practitioners in Sabah and Sarawak be protected from intrusion of practitioners from other regions, particularly Malaya (now politically referred to as West Malaysia or Semenanjung Malaysia).

E **[43]** If there is anyone to be blamed for the cause of this misunderstanding, it is the draftsmen, who drafted the modification order. Instead of being silent about the geographical limitation, the words "in Sarawak" was either intentionally or inadvertently included. With the use of words "in Sarawak" the practice of Sarawak lawyers was limited to the geographical borders of that F State. In our opinion, it would have been more appropriate to use the words "in respect of matters arising in Sarawak". That is how we perceive it to be. Probably the Attorney General's Chambers would take heed and make the necessary legislative recommendations for Sabah and Sarawak, which could eventually G strengthen the position we are embarking upon now.

Section 35 Of The Legal Profession Act 1976

[44] As to s. 35 of the Legal Profession Act 1976 ("LPA"), it is H pertinent to clarify here how s. 35 of the LPA is not applicable in this case. The reason is this.

[45] The LPA was passed after Malaysia was formed. Before that, advocates and solicitors of Malaya have no right of audience before the appellate courts in respect of a case arising in a I Borneo State when the case is heard in Malaya or outside the Borneo States. Section 35 LPA states as follows:

Section 35 - Right of advocate and solicitor.

(1) Any advocate and solicitor shall, subject to this Act and any other written law, have the exclusive right to appear and **plead in all Courts of Justice in Malaysia according to the law in force in those Courts;** and as between themselves shall have the same rights and privileges without differentiation.

Plain reading of the above section would make it clear that any advocate and solicitor can appear in any courts in Malaysia.

[46] However, it is sufficient to say that s. 2 of the LPA[28] also makes it clear the LPA shall only be made applicable to Sabah and Sarawak if there is a modification order by the Yang di-Pertuan Agong to that effect. There is no such order that has been made or published in the Gazette, thus s. 35 of the LPA cannot apply to Sabah and Sarawak.

Decision Of The Court

[47] Upon the reasons adumbrated above, it is the unanimous decision of this court to answer the first question in the negative and the second question in the affirmative.

[48] In allowing these appeals, the respondent had not requested for costs. Thus, there is no order as to costs for both appeals.

End notes:

1. See *Dato' Ting Check Sii v. Datuk Hj Muhammad Tufail Mahmud & Ors* [2009] 1 CLJ 899.
2. Rule 3 – (1) The court may sit at any place within any of the territories to which the Order in Council applies. (2) Without prejudice to the previous provisions of these Rules and subject to such directions as the Chief Justice may give, the court shall ordinarily sit: (a) in the case of appeals and matters arising in Brunei either in Brunei or in Sarawak, as the Chief Justice may determine. (b) in the case of appeals and matters arising in North Borneo – in North Borneo. (c) in the case of appeals and matters arising in Sarawak – in Sarawak).
3. Paragraph 1 of the Report of the Inter-Governmental Committee, 1962: Introduction: A Commission under the chairmanship of Lord Cobbold visited North Borneo and Sarawak between February and April 1962, and its Report was published as CMND 1974 on 1 August 1962. The Commission was unanimously agreed that a Federation of Malaysia is in the best interests of North Borneo and Sarawak and that an early decision in principle should be reached.

4. Paragraph 3: The two Governments decided to establish an Inter-Governmental Committee, on which the British, Malayan, North Borneo and Sarawak Governments would be represented. Its task was to work out the future constitutional arrangements, including safeguards for the special interests of North Borneo and Sarawak to cover such matters as religious freedom, education, representation in the Federal Parliament, the position of the indigenous races, control of immigration, citizenship and the State Constitution.

5. Paragraph 6: On 12 September 1962 the following motion was unanimously adopted by the Legislative Council of North Borneo:

Be it resolved that this Council do welcome the decision in principle of the British and Malayan Governments to establish Malaysia by 31 August 1963 provided that the terms of participation and the constitutional arrangements will safeguard the special interests of North Borneo, and do accordingly authorize the following Members of this Council to represent North Borneo on the proposed Inter-Governmental Committee to prepare detailed constitutional arrangements which will be laid before this Council:

The Honourable the Chief Secretary

The Honourable the Attorney General

The Honourable the Financial Secretary

The Honourable O.K.K. Datu Mustapha bin Datu Harun, O.B.E.

The Honourable Khoo Siak Chiew

The Honourable D.A. Stephens")

6. Paragraph 7: On 26 September 1962 the following motion was adopted without dissent by the Council Negri of Sarawak:

That this Council:

(a) welcomes the decision in principle of the British and Malayan Governments to establish Malaysia by 31 August 1963, on the understanding that the special interests of Sarawak will be safeguarded;

(b) notes that an Inter-Governmental Committee has been established to work out the detailed constitutional arrangements and the form of these safeguards, which will be laid before this Council;

(c) authorises the Chief Secretary, the Attorney-General, the Financial Secretary, the Datu Bandar Abang Haji Mustapha, Temenggong Jugah anak Barieng, Pengarah Montegrai anak Tugang, Mr. Ling Beng Siew and Mr. Chia Chin Sin to represent Sarawak on this Committee; and

(d) authorises the Governor in Council to nominate as additional members of the Committee or as members of Sub-Committees thereof such unofficial members of this Council and such public officers as may be desirable.

(e)

7. See p. 3 of the Malaysian Agreement, see also *State of Kelantan v. Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355)

8. Article VIII – The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to, the Report of the Inter-Governmental Committee signed on 27 February 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia.

9. Section 8 – Subject to s. 9, advocates and persons referred to in para (b) of s. 10 shall have the exclusive right to practice in Sarawak and to appear and plead in the Supreme Court, and in all courts in Sarawak subordinate thereto in which advocates may appear, and, as between themselves, shall have the same rights and privileges without differentiation; …

10. *The Birth Of Malaysia*; 3rd edn; Malaysia, Singapore and Hong Kong; Sweet & Maxwell Asia; 2008;

11. Paragraph 26(1) – "The Judiciary – 26(1) In addition to a supreme Court of Malaysia the Federal Constitution should establish three High Courts, for the States of the existing Federation, Singapore and the Borneo States (in this paragraph the term Borneo States could include Brunei) respectively."

12. Paragraph 26(4) – "The domicile of the Supreme Court should be in Kuala Lumpur. Normally at least one of the Judges of the Supreme Court should be a Judge with Bornean judicial experience when the Court is hearing a case arising in a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State."

13. Article 74: Subject matter of Federal and State laws: (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule); (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the

A Concurrent List.; (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.; (4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

14. Article 77: Residual power of legislation: The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

15. Section 13(2) The following jurisdiction shall be vested in a court which shall be known as the Federal Court and shall have its principal registry in Kuala Lumpur, that is to say:

(a) exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the Court); and

(b) such original or consultative jurisdiction as is specified in arts. 128 and 130.

This is in line with para. 26 of the IGC Report. See para 24.

16. Section 63(1) In so far as any provision made by or under an Act of Parliament, by removing or altering a residence qualification, confers a right to practice before a court in the Borneo States or either of them on persons not previously having the right, that provision shall not come into operation until adopted in the States or State in question by an enactment of the Legislature.

(2) This Article shall apply to the right to practise before the Federal Court when sitting in the Borneo States and entertaining proceedings on appeal from the High Court in Borneo or a judge thereof or proceedings under cl. (2) of art. 128 for the determination of a question which has arisen in proceedings before the High Court in Borneo or a subordinate court in a Borneo State.

17. Section 73(3) Subject to the following provisions of this Part, the present laws of the Borneo States and of Singapore shall, on and after Malaysia Day, be treated as federal laws in so far as they are laws which could not be passed after Malaysia Day by the State Legislature, and otherwise as State laws.

18. 87(1) Until other provision is made by or under federal law, the appellate jurisdiction of the Federal Court and the jurisdiction of the High Courts, and (so far as may be) the practice and procedure to be followed by those Courts in the exercise of that jurisdiction,

shall, subject to the provisions of this section, be the same as that exercised and followed in the like case immediately before Malaysia Day in the Supreme Court of the Federation, the Supreme Court of Sarawak, North Borneo and Brunei or the Supreme Court of Singapore, as the case may be:

19. (7) For the purposes of this section the right of audience in a court shall be deemed to be a matter of the practice of the court; but in the Federal Court any advocate of a High Court shall have that right, if and so long as it depends on this section.

20. (8) For the purposes of this section the Court of Criminal Appeal in Singapore shall be treated as having been a division of the Court of Appeal.

21. (9) This section has effect subject to art. 161B of the Constitution.

22. See s. 13(2) of the Malaysia Act, *Supra* para 28.

23. Article 161B: Restriction on extension to non-residents of right to practice before courts in States of Sabah and Sarawak:

(1) In so far as any provision made by or under an Act of Parliament, by removing or altering a residence qualification, *confers a right to practice before a court in the States of Sabah and Sarawak or either of them on persons not previously having the right, that provisions shall not come into operation until adopted in the States or State in question by an enactment of the legislature.*

(2) This Article shall apply to the right to practice before the Federal Court or the Court of Appeal when sitting in the States of Sabah and Sarawak and entertaining proceedings on appeal from the High Court in Sabah and Sarawak or a Judge thereof or proceedings under Clause (2) of Article 128 for the determination of a question which has arisen in proceedings before the High Court in Sabah and Sarawak or a subordinate court in the State of Sabah or Sarawak.

24. [1981] 1 MLJ 29 at p. 32-33.

25. *Supra* para 20.

26. Section 5 – Amendment of laws – (1)Every written law which was in force in any part if Malaysia on Malaysia day is hereby amended in accordance with the provisions of this section. (2) In every such written law the expression "Federal Court" shall be substituted for the expression "Court of Appeal". (3) In every such written law the expression "Federal Court" or the expression "High Court" shall be substituted for the expression "Supreme Court" as the context may require. (4) This section shall be deemed to have come into force on Malaysia Day.

27. Section 74(1) – Subject to the provisions of this section the Yang di-Pertuan Agong may by order make such modifications as appear to him necessary or expedient in consequence of the passing of this Act in any present law relating to matters about which Parliament has power to make laws.

28. Section 2 – Application: This act shall apply throughout Malaysia but shall only be made applicable to Sabah and Sarawak with such modification to Sabah & Sarawak with such modifications as the Yang di-Pertuan Agong may by order make; and such order shall be published in the Gazette.